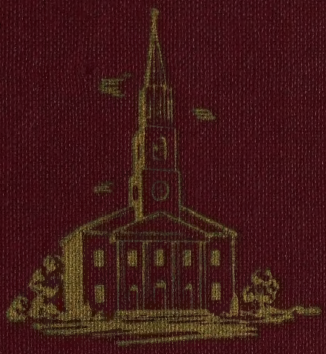

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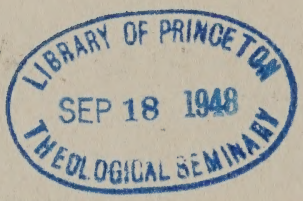

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CHURCH AND STATE

By

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Preface

RELIGION, as a way of life, is the most profound influence in human experience. It imbues plain men with greatness. It endows great men with courage and purpose. And through men's lives the power of the spirit becomes for the nation a foundation and a force for progress.

In the development and preservation of the basic institutions of a free and liberty-loving America, the spiritual power of religion has always played a fundamental part. Free to worship after the dictates of their own consciences, men have woven into the fabric of the republic the dignity and honor or righteousness. The influence of religion in developing the American polity is measured by this series.

The National Foundation for Education in American Citizenship has arranged the Fundamental American Principles Series on Religion to portray for every citizen the contributions of religion to our way of life. Each essay is written by a distinguished authority. The Foundation is a nonpartisan, nonsectarian public trust, and views expressed, as in each of its publications, are those of the author and are not to be interpreted necessarily as views of the Foundation's board or officers.

Topics in the series indicate the breadth and depth of religious influences:

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Editors of the series are Frank J. Klingberg, Professor of History, University of California, Los Angeles, and Franklin L. Burdette, Professor of Government and Politics, University of Maryland.

These authoritative summaries show vividly the fundamental relationship between religious faith and basic American principles. The historic role of the churches, the American churches in action, and the role of a nation imbued on the whole with Christian religious standards are treated with understanding and vision.

—Samuel R. Harrell

Chairman, Board of Trustees
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CHURCH AND STATE

Church and State

INTRODUCTION

THE AMERICAN METHOD of dealing with Church and State relations has long been regarded as one of our definite contributions to political theory and practice. This fact was noted more than a hundred years ago by Alexis de Tocqueville in his *Democracy in America* and, half a century later, by James Bryce in his *American Commonwealth.* Nevertheless, our system has had its critics, including the distinguished Italian scholar, Francesco Ruffini, who thinks it is based on "an imperfect or at least one-sided conception of religious liberty."[1] However that may be, Americans will see their practice in clearer perspective if they consider, first, certain other forms of Church and State relationship; and, secondly, how our system came to be what it now is.

In the medieval society of Western Christendom, there

[1] In his *Religious Liberty* (English translation by J. P. Heyes, New York, 1912), p. 510.

was general agreement on the essentials of faith and worship. The Church and the State were regarded as two agencies of the same Christian society. They had their special spheres of action, though with some interlocking; but they were expected to cooperate in serving the material and spiritual interests of the community. The civil ruler—whether emperor, king, feudal magnate, or city magistrate—was bound to support the one Church and to defend the purity of the faith by the suppression of heresy. The Church in turn recognized the duty of its members—clergy and laity—to support the regularly constituted civil authorities.

The Protestant Revolution brought important changes. The unity of European Christendom was broken and in western Europe, as in the case of England under its Tudor rulers, independent national churches were organized. Nevertheless, it was commonly assumed that the English nation as a whole, speaking through king and parliament, should determine religious as well as secular issues. This practice is no longer true in present-day England, but something of the old order still survives. The king is still in legal theory the head of the national church, which also has its representatives in the House of Lords. On the other hand, the bishops

are chosen by the crown—by the king's ministers—who may or may not be members of the established church. Even changes in the prayer book must be approved by parliament. Furthermore, while the dissenting denominations may refuse communion to members who do not meet certain standards of conduct, the freedom of the established church to enforce its discipline in such matters as divorce and remarriage is subject to control by the civil courts. Notwithstanding the formal establishment of the Church of England, members of other denominations have complete freedom of belief and public worship, and their members are subject to no civil or political disabilities.

In other modern European states, both Catholic and Protestant, there has also been a combination of official preference to a particular church with toleration for other religious groups and more or less governmental interference in what we should regard as distinctly church matters, as for instance in the selection of bishops. Still another type of Church-State relationship was in effect in France during the greater part of the nineteenth century. There Catholic, Protestant, and Jewish clergy all received stipends from the government—an arrangement which ended, however, in 1905 when Church and State were formally separated.

Over against the old-world traditions so far described, stands the theory of the complete separation of the Church from the State, a theory labeled by some of its critics by the less pleasant name of "separatism." Carried to its logical conclusion, this theory has perhaps been best expressed in this country by Roger Williams. For him religion was a matter of entirely free choice in the light of the individual conscience. Churches should, therefore, be treated as purely voluntary associations of persons who held similar convictions of faith and worship. In this field of religion, the State had, he believed, no authority and no responsibility. In a general way, Williams' theory corresponds with present-day American practice, which accepts the principle of full religious liberty and excludes the establishment of, or the granting of special privileges to, any particular church. It will be seen later, however, that our state and federal governments do not actually carry this "separatist" principle to its complete logical conclusion.

Meantime, we have to keep in mind that our present American system has evolved slowly from the very different situation which prevailed in the first century of our colonial era.[2]

[2] See also my *Religion and the State: The Making and Testing of an American Tradition* (New York, 1941), Chapters II, III.

I

STATE CHURCHES IN EARLY AMERICA

THE GREAT MAJORITY of the seventeenth-century Anglo-American colonists brought with them old-world ideas of the responsibility of the State for the promotion of what was believed to be the true religion and the suppression of other forms of faith and worship which they regarded as false or undesirable. This attitude was equally characteristic of the Anglican churchmen in Virginia and of Puritans in the New England colonies of Massachusetts and Connecticut. Both Virginians and New Englanders then denied religious liberty to Catholics, Quakers, and Baptists. Anglican worship was suppressed in Massachusetts, and Puritan practices were banned in Virginia. In both these colonies there were established churches supported by public taxation and church attendance was made compulsory.

In other provinces, where there was more or less religious toleration, as in the Carolinas and New York, there was special recognition of the Church of England. Notwithstanding the liberal policies of Lord Baltimore and William Penn, neither Maryland nor Pennsylvania

was consistently neutral in matters of religion. Though the Catholic Lord Baltimore gave equal protection to Protestants and Catholics, the famous Maryland "Act Concerning Religion" (1649) made denial of the Christian Trinity a capital offense. Fortunately this penalty seems never to have been applied. By the end of the century the Baltimore family had lost control of the government and the Anglican church was established. Even after the Baltimore heirs—now Protestants—recovered their charter privileges, there was severe discriminatory legislation against the Catholics. Though Penn and his Quaker associates were committed to the principle of religious liberty, they believed that the State should promote the spiritual welfare of its people. Freedom of faith and worship was actually secured to all who believed in one God, thus including the Jews; but political privileges were limited to Christians; and later, under pressure from the British government, Catholics were excluded from public office. Even in Rhode Island, which under the leadership of Williams had established complete religious liberty without discrimination, a later generation enacted a law which, as interpreted by the Supreme Court of the colony, denied full citizenship to Catholics and Jews.

Thus for the most part, our seventeenth-century ancestors believed that religion was an affair of the community as a whole and not one of merely individual choice. Before the Revolution, however, this older tradition had been considerably weakened and substantial progress had been made toward religious liberty. This change cannot be explained by any simple formula but was the result of several factors varying in importance from one colony to another.

Economic considerations certainly had an important part in this development. In the proprietary provinces, for instance, the proprietors were not only rulers but landlords interested in developing the territories which they had received from the crown by offering, among other inducements to settlers, the promise of religious liberty. Church of England proprietors of Carolina and New Jersey were willing to allow Puritan immigrants from New England to maintain in their new homes the kind of churches to which they had been accustomed. The policies of the home government itself worked in the same direction. As early as 1663, the principle of toleration was definitely accepted in the Carolina and Rhode Island charters. In 1679, a Virginia governor was advised to encourage immigrants who could bring

property into the colony even though they were of "different persuasions in matters of religion." So in the eighteenth century the Anglican rulers of the Virginia seaboard promised toleration to Presbyterians from the north in order to encourage new settlements beyond the mountains.

After the English Revolution of 1689, made possible through a combination of Anglican churchmen with Protestant dissenters, the latter were rewarded by the grant of toleration for their ministers and churches. This legislation also influenced the colonies, and ten years later a similar measure was enacted in Virginia, but, as in the case of the English statute, with restrictions which caused trouble later. Meantime, royal instructions to the colonial governors accepted this principle of toleration for different kinds of Protestants, though the older establishments, Puritan or Anglican, retained their privileged positions throughout the colonial era. In New England, dissenters from the established Congregational churches undoubtedly profited by the fact that in this section the Church of England itself was treated as a dissenting sect along with Baptists and Quakers, and suffered with them from discriminatory legislation.

Although economic and political expediency had much to do with the advance of religious freedom, more idealistic considerations should not be ignored. Williams and Penn and their associates pleaded for liberty as the result of clearly defined and deeply felt convictions. To the colonies which they founded came men of various sects, some of which were, like the Baptists, opposed on principle to state interference with religion. From Rhode Island and the Delaware colonies, partly through migration and partly through the example of their tolerant practice, minority groups were gradually strengthened. An especially important influence in this direction was eighteenth-century mass migration from Ireland and Germany.

Meantime, there were two cross-currents of religious thought, which in opposite ways affected the position of the established churches. Their traditional orthodoxy was undermined by the spread of Deism, especially among the "intellectuals." At the same time the widespread revivals known as the "Great Awakening," generally discouraged by the conservative clergy—both Puritan and Anglican—made an emotional appeal which the more formal religion of the older churches failed to satisfy. The result was a decided reinforce-

ment of the minority groups in their struggle for equal rights.

On the eve of the Revolution there were still state churches in most of the colonies; but in the South generally their adherents were now outnumbered by Protestant dissenters of one sort or another. Actual interference with the public services of the latter had become comparatively rare, though the treatment of Baptist preachers in Virginia was a conspicuous exception. The chief grievance of the dissenters was now the compulsory payment of church taxes. In New England, partial concessions had been made in this respect to Episcopalians, Baptists, and Quakers who could show that they were maintaining religious services in their own neighborhoods.

One religious group failed to share in this pre-Revolutionary progress toward religious liberty. Catholics were everywhere subjected to some kind of disability. Pennsylvania was the one colony where their public services were freely held, and even there they were barred from public office. In Maryland, their clergy could officiate only in private chapels and Catholic laymen suffered from harsh discriminatory legislation. In Massachusetts and New York, the service of the Mass

was prohibited by law. Immigration and naturalization laws, British and colonial, either excluded Catholics or placed them at a disadvantage.

II

SEPARATION OF CHURCH AND STATE

THE OUTBREAK of the Revolution made possible a new advance toward religious liberty and the separation of the Church from the State. The Anglican establishments now found their connection with the British state a positive disadvantage. Furthermore, so large a proportion of their leaders took the Tory side that the Church as a whole suffered a serious loss of prestige from the standpoint of the victorious Whig party, even though a considerable number of the clergy, as well as of the laity, especially in the South, supported the Revolution. In Virginia, for instance, most of the Whig leaders were at least nominal members of the Episcopal church. Furthermore, many liberal-minded persons, regardless of church affiliations, came to feel that the denial of freedom and equality in matters of religion was

inconsistent with the principles of the Revolution. The need of united effort in the common cause was also an important practical reason for further concessions to minority groups, including the Catholics as well as Protestant dissenters.

During the war, the established churches of the South lost bit by bit their special privileges. The Virginia constitution of 1776 declared all men "equally entitled to the free exercise of religion." Although the connection between the Church and the State was not formally dissolved until after the war, dissenters were relieved from the payment of church taxes. The partial Anglican establishment in New York also came to an end. In New England, conditions were very different. There the tax-supported Congregational churches, founded by the first generation of Puritan colonists, were deeply rooted in the soil. They had nothing to lose by separation from the British Empire and most of their clergy were active Whigs. In this section there had been comparatively small immigration and the dissenting groups were consequently much weaker than in the South. So the war ended with no radical change in the preferred status of the Congregational churches. Even here, however, as in the rest of the country, all the churches, including

the Catholic, gained full freedom of public worship.[3]

Religious tests for public office or membership in the legislature were retained in most of the states. Even Pennsylvania excluded non-Christians from its legislature. The Maryland constitution authorized state appropriations for "the support of the Christian religion." In South Carolina, where the Anglican establishment had been overthrown, the "Christian Protestant religion" was declared to be "the established religion" of the state. Corporate status was conceded only to religious groups which recognized Christianity as "the true religion."

During the so-called "Critical Period," two significant forward steps were taken. In 1783, Rhode Island ended the exclusion of Catholics from full citizenship; and in 1786, after a hard fight, Jefferson's famous bill "for establishing Religious Freedom" was finally placed on the Virginia statute-book. This enactment substantially completed the process of separation in that state, ending all forms of compulsion and discrimination in matters of religion. During the next half-century one state after another took similar action, though here and there

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[3] The process of separation, during and after the Revolution, is treated more fully in my *Religion and the State,* Chapter IV, with references to sources and special studies. See also E. F. Humphrey, *Nationalism and Religion in America, 1774-1789* (Boston, 1924).

religious tests of one kind or another continued into the nineteenth century.

The new federal union was also gradually defining its position on the Church-State issue. During the Revolutionary War, Congress went on record as sympathetic with religion in general, and specifically with the Christian religion. Chaplains of different denominations were appointed for its own sessions and for the Continental army. In most respects, however, it was assumed that religion was a matter for the individual states. John Adams evidently expressed the feeling of his Congressional colleagues when he wrote: "I hope that Congress will never meddle with religion further than to say their own prayers, and to fast and give thanks once a year. Let every colony have its own religion without molestation."[4] An interesting test of Congressional opinion came during the debate on the Land Ordinance of 1785 for the Northwest Territory, when a clause allotting a section in each township for the support of religion was rejected though five states voted for it.

During the next few years there were three important decisions within the sphere of federal action. The first was the Northwest Ordinance of 1787. One of its

[4] J. Adams, *Works*, Vol. IX, p. 402.

"Articles of Compact" forbade interference with any person in that territory "on account of his mode of worship, or religious sentiments." A second important step was taken in the same direction when the Federal Convention approved without serious opposition a clause forbidding religious tests for "office or public trust under the United States." During the debates on the ratification of the new Constitution, a few critics objected to this clause, but others wished a more general guarantee of religious liberty. This assurance was presently accomplished through the First Amendment, which declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Neither of these two constitutional provisions, however, was concerned with religious tests or church establishments in the states.

By the broad scope of the Constitution under the Fourteenth Amendment the protection of the United States is also thrown over the religious liberties which were previously protected only against federal encroachment. Consequently the government of the United States is now the chief protector against abuse of religious liberty.

As we have seen, the last stronghold of the established church principle was New England. There the conflict

between the supporters of the Congregational "standing order" and the dissenters who demanded the complete separation of the Church from the State continued for half a century after the Revolution. Connecticut acted first in its constitution of 1818, which guaranteed complete freedom of religious worship "without discrimination," forbade preference by law to any Christian sect or mode of worship, and declared that no person should be required to support any church other than that of his own choice.

Action in Massachusetts came more slowly. During four decades after the adoption of the first state constitution, no change was made in the articles dealing with religion, including: religious tests for public office; compulsory taxation for the established churches, though in certain cases taxes paid by dissenters might be applied to the support of their own services; and finally the right of the legislature to require church attendance. During this period some concessions to dissenters were made by law, but the first constitutional change was delayed until 1821, when religious tests for office were abolished. On the other hand, proposals then made to repeal or liberalize the article on church taxes were defeated.

During the next twelve years there was a marked change in public opinion. The theological conflict in the Congregational churches between orthodox Trinitarians and Unitarians weakened the defenders of the old order. Furthermore, the dissenting groups were increasing in numbers and influence. Beside the Protestant denominations, old and new, Irish immigration had greatly strengthened the Catholic church. So it came about that in 1833 a constitutional amendment was adopted which placed all religious denominations on an equal footing, put an end to public taxation for the support of any church, and excluded any form of church establishment.[5]

Thus by the middle of the nineteenth century, the American commonwealths had established these essential principles of our present national policy regarding the relation of the political government to religion and the churches: (1) freedom of expression by every citizen in matters of faith; (2) the equal right of all orderly religious associations to maintain their various modes of organization and public worship; and (3) the prohibition of church establishments.

[5] On the process of separation in Massachusetts, see J. C. Meyer, *Church and State in Massachusetts* (Cleveland, 1930).

III

RELIGION AND THE LAW

NOTWITHSTANDING the supposed separation of the Church from the State, that separation is by no means complete. Some older ideas have survived; some relation between these two social agencies is inevitable in any community; and certain problems involved in this relation still remain.

Survivals of the colonial tradition may be seen in a few state constitutions which require or permit the exclusion from public office of atheists, or persons who do not believe in a future state of rewards and punishments.[6] It is doubtful, however, whether such provisions have often been enforced. Much the same thing is true of tests in the courts for jurymen and witnesses. Under the common law, only a believer in God and a future state of rewards and punishments could be accepted as a competent witness. Although many states now definitely forbid the imposition of such tests, there are others in which the common law rule is still in force.

[6] For a list of such constitutional provisions, see Carl Zollman, *American Church Law* (St. Paul, 1933), pp. 6-7.

Actual cases of exclusion on this ground are now comparatively few.[7]

More significant than the occasional survival of religious tests is the fact that our federal and state governments have, while taking no stand in favor of any particular church, generally shown their sympathy with religion. The precedent set by the Continental Congress for the appointment of Congressional chaplains has been followed under the Constitution. Chaplains now officiate regularly in the Senate and the House. Similarly state governments provide chaplains of different religious persuasions for their penal and reformatory institutions. On the same principle, our Army and Navy are provided with chaplains—Catholic, Protestant, and Jewish.

A question much discussed in the past is that of the relation of Christianity to the common law, a part of our English inheritance which, though greatly modified by American statutes, is still to a greater or less extent followed in most of our state courts. There are on record both English and American judicial decisions asserting that Christianity is a part of the common law. The element of truth in this doctrine is the fact that the common law, developed largely in the English Middle Ages in a

[7] *Ibid.*, pp. 616-617.

society profoundly influenced by the Church, does undoubtedly embody much of Christian ethics. On the other hand, the assertion that Christianity in the sense of dogma—as against, let us say, Judaism—is a part of the common law can hardly be sustained. Under actual present conditions, this issue has ceased to have much importance.[8]

From a practical standpoint, a much more significant form of state support to religion is the exemption of church property from taxation. Here we have distinct recognition by the State of the churches as constructive social agencies. Most Americans, whatever their ecclesiastical relations—Catholic, Protestant, or Jewish—have regarded religion as an essential factor in the maintenance of that social morality on which public order and the welfare of the State necessarily depend. On this point American opinion is fundamentally in accord with the authors of standard Catholic and Protestant treatises on Church and State. Though there are differences in detail from one state to another, particularly as to the precise definition of church property, all the states have accepted the general principle of tax exemption for prop-

[8] Compare, however, the discussion of this subject in Zollman, *American Church Law,* pp. 26-34.

erty definitely used for religious purposes. As to future policy in this respect, opinion is not quite unanimous. Some people, now as in the Middle Ages, are concerned about the increasing amount of real estate thus withdrawn from taxation and the consequent additional load carried by other taxpayers. From the standpoint of theory, a few persons here and there have objected to such exemption on the ground that it violates the principle of separation.

To some extent legislation is still influenced by religious considerations. Christmas, and in some states Good Friday, in the Christian calendar are set apart as legal holidays. Sunday closing laws generally originated in the desire to promote the religious observance of the day. In recent years, economic and humanitarian, other than strictly religious, considerations have become increasingly influential. Another form of deference to religious sentiment is the penalizing of blasphemy. Older laws on the subject, notably in the Puritan colonies, were much broader in scope than would now be generally approved and have commonly been repealed or not enforced. So far as the courts now concern themselves with so-called blasphemous utterances, a primary consideration is the desire to prevent disturbances of

the public peace by giving unnecessary offense to particular religious groups. In any case, many genuinely religious persons question whether legislation is the best method of dealing with objectionable language of this kind.

While the equal right of all churches to freedom of belief, public worship, and the peaceful propagation of their respective religious systems is recognized by our civil authorities—federal, state, and local—it remains true that the principle of religious liberty may not be pleaded in defense of acts contrary to generally accepted morality or public order. Thus, for example, the New York constitution provides that liberty of conscience "shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this State." The most familiar instance of the application of this principle occurred in connection with the Mormon practice of polygamy. Though advocated as a matter of religious conviction by many sincere persons, it was suppressed, first by the action of Congress and subsequently by state action.

If the State may punish an individual for acts injurious to public morals or public order, even when enjoined by the religious organization of which he is a

member, there remains the question how far the State should go in compelling a citizen to perform acts which are forbidden by the rules of his church or by his own sense of religious duty. In colonial times this question arose chiefly in connection with the Society of Friends and certain other sects which agreed with the Friends in their opposition to the bearing of arms and the taking of oaths. In the nineteenth century and in our own time, the question of enforcing military service has been much the more prominent, whether the refusal to perform such service has been based on religious or general ethical grounds. In general, the policy of our governments, federal and state, has been to respect so far as possible the sincere convictions of citizens and make such concessions as may be feasible. Thus, in response to the scruples of Quakers and others in the matter of oaths, a simple affirmation will now be accepted in place of an oath.

The question of exemption from military service is still a difficult one. The great majority of our people agree that it is the duty of the citizen to support the government under which he lives and from which he receives not only protection against violence but many other services. This support includes the payment of

taxes and, if necessary, taking up arms for defense against enemies at home and abroad. On the other hand, a comparatively small number of persons believe that a higher law than that of their country forbids the performance by them of a duty which is binding on their fellow citizens. Usually this conscientious objection to bearing arms has been associated with membership in a religious organization which forbids such service by its members. In recent times a considerable number of persons have taken the same position as a matter of purely individual conviction, whether strictly religious or not.

Here again our legislation from the period of the Revolution to the present time has made special provisions for conscientious objectors, more particularly when their objection was based on *bona fide* membership in a religious organization whose tenets forbade the bearing of arms. In the case of other objectors, it is not always easy to determine how far their objection to service is genuinely one of religious or ethical conviction. On the whole, it may be said that in recent years a sincere effort has been made by our government to give all possible relief by permitting such persons to substitute noncombatant service. In some cases, however, con-

scientious objectors have not been satisfied with mere exemption from the bearing of arms. Others have refused to register, even with the knowledge that after registration their claims to exemption will be considered. Such cases undoubtedly embarrass even humane administrators and judges. It is hardly surprising, though regrettable, that a few individuals have been harshly dealt with.[9]

The issue raised by the conscientious objector naturally attracts most attention during a war, but it has also come up in peace time in connection with applications for citizenship. A number of such applications have been rejected on the ground that the applicants were unwilling to take the oath of allegiance without reserving the right, on conscientious grounds, to refuse military service. Not all of these persons were members of pacifist religious denominations. One of them, a theological professor, had served during the First World War as an army chaplain but would not pledge himself to take up arms except in what he believed to be a just war. In this case the United States Supreme Court was

[9] An excellent discussion of this problem from the standpoint of a pacifist who is also a competent lawyer is: Julian Cornell, *The Conscientious Objector and the Law* (New York, 1943). The author notes especially the difficulties of securing prompt relief through the courts. For other references on this topic, see my *Religion and the State,* pp. 137*ff*.

sharply divided. A bare majority held that the applicant was not entitled to citizenship, but four of the justices, headed by Chief Justice Hughes, dissented. The minority opinion held that while the sovereign power might "enforce obedience to laws regardless of scruples," the obligations imposed by the oath of allegiance should not be so interpreted as to exclude from citizenship persons who would not promise unconditionally "to obey a law believed to be in conflict with religious duty."[10] This dissenting view was influential in persuading the Supreme Court in 1946 to reverse itself and to admit a noncombatant to citizenship.

Beside the questions raised by the individual conscientious objector, there is also a fundamental issue between the claims of the State and those of the Church or churches as corporate bodies. Assuming that they have distinct spheres of action, are they to be considered as mutually independent within those spheres, each receiving its authority from an independent source? If so, who shall judge where the line should be drawn between the

[10] United States *v.* Macintosh, 283 U. S. 605. Another leading case is that of U. S. *v.* Schwimmer in which Justice Holmes delivered a dissenting opinion (279 U. S. 644). These cases were overruled in Girouard *v.* U. S., 328 U. S. 61 (1946), in which the Court admitted to citizenship a Seventh Day Adventist who was ready to give noncombatant service.

two authorities? On the one hand, there are those who maintain that within any given area the State has the ultimate sovereignty and must have the last word as against any other corporate entity, religious or otherwise. The Church, or churches, can from this standpoint have only such authority in external matters as may be conceded to them by the State The opposite view was clearly stated by Pope Leo XIII in his famous Encyclical "On the Christian Constitution of States" (1885). He denied that the rights of the Church were limited to those which she held "by the favor and concession of the government." He insisted that the Church "no less than the State" was a "society perfect in its own nature and its own right."[11]

If within its own divinely appointed sphere the Church is independent of the State, with a superior claim on the allegiance of its members, the question arises who shall decide where the line is to be drawn between this spiritual sphere of the Church and the temporal sphere of the State. In Catholic theory, the Church has the right, in the last resort, to determine whether action by the State does or does not involve matters of faith and

[11] Text of the Encyclical, with comments, in J. A. Ryan and M. F. X. Millar, *The State and the Church* (New York, 1922), Chapters I, II.

morals, of which the Church is the supreme guardian.[12] It cannot be said that there is any generally accepted Protestant pronouncement on this subject, since there is no universally recognized authority to determine at which point civil authority must yield to a higher spiritual allegiance. The issue thus becomes more a matter of personal conviction, guided but not controlled by the rules of the church to which the individual belongs. Nevertheless, Protestant as well as Catholic theologians hold to the Scriptural distinction between the things which are Caesar's and the things which are God's and agree that there are cases in which resistance to the State may be justified by a higher spiritual law. Fortunately in our own time and country, upholders of one or the other of these opposing theories have not been disposed to force the issue of theory. In practice serious conflicts between them have been avoided.

A good illustration of the practicability of mutually satisfactory adjustments between Church and State may be seen in legislation dealing with church property and the rights of ecclesiastical corporations. So far as churches acquire property, they are subject to, and in

[12] See an interesting recent statement by the liberal Catholic writer, Jacques Maritain, *Things That Are Not Caesar's* (New York, 1930).

practice accept, the rules of the civil authority regarding the legal conditions under which such property may be held or transferred. This control includes the right of eminent domain by which private property required for public purposes may be taken with due compensation. Several states have also limited the amount of real estate which may be held by religious organizations. The Maryland constitution, for instance, requires special legislation for the acquisition by such an organization of more than five acres. In general, American legislation has been liberal in this respect. It is possible that as ecclesiastical holdings increase, with consequent exemption from taxation, there may be agitation for legislation similar to the medieval statutes of mortmain which restricted the extent of such holdings.

An important phase of state action affecting the churches is the law dealing with corporations. Through incorporation by the State, a church, like any other association, becomes a legal person and as such may acquire and transfer property or sue and be sued. This corporate status, without which a church would be hampered in the management of its property, is received from the State through general or special legislation. State laws on this subject vary considerably. In Virginia,

for instance, where the colonial establishment of the Episcopal church was abolished after the Revolution, the reaction against its special privileges was so strong that even now the state constitution forbids the creation of any ecclesiastical corporation in the full sense of that term. This case is exceptional. In general, state legislation is sufficiently flexible to be workable for different types of church organization. Thus corporate privileges may be exercised by a Catholic or Anglican bishop as a "corporation sole," by regularly chosen trustees, or by a parish meeting.[13]

Though under the American system the State does not concern itself with the merits of any creed, form of worship, or church government, such interests may indirectly be involved in cases coming before the civil courts. If two opposing parties in a given church both claim to speak for the church as a whole and to control property held by it, the issue may be brought into a civil court whose decision may definitely affect religious interests. So it was, for example, when the Supreme Court of Massachusetts held that church property in the town of Dedham belonged to the taxpaying parishioners, who

[13] Compare on the subject of property rights and corporate status of churches, Zollman, *American Church Law,* Chapters III-V, XV.

happened to be predominantly Unitarian, rather than to the communicants, among whom orthodox Congregationalists were in the majority. Another situation in which the civil courts were involved arose a century ago when lay trustees of Catholic parishes asserted claims held to be contrary to church law. In general, however, state and federal courts when called on to decide between property claims of opposing ecclesiastical parties are expected to follow the decisions of the highest authority within the church.[14]

IV

CHURCH AND STATE IN SOCIAL ACTION

THERE ARE certain fields of social action in which both Church and State have a vital interest, in which both claim to speak with authority, and about which they take very different attitudes. One of these "twilight zones" has to do with the marriage relation and another with education.

In most of the American states there has been a marked tendency to relax older standards by facilitating divorce and increasing the number of grounds on

[14] *Ibid.*, Chapter IX. The leading case is Watson *v.* Jones, 80 U. S. 679.

which it may be granted by the civil courts. Since each state is a law unto itself, all shades of opinion are reflected in the statute-books, from refusing to recognize divorce altogether to a "wide-open" policy which imposes only the slightest restrictions on the dissolution of marriage and the subsequent remarriage of the parties. One commonwealth of the latter class is notorious for the ease with which it grants divorces to citizens of more conservative states after a nominal period of residence. This loosening of the marriage tie has been condemned by religious-minded persons in the churches generally, some of which have definite rules barring the remarriage of divorced persons—either absolutely or except in the case of the "innocent party."

The most conservative position is that of the Roman communion, which regards marriage as a sacrament and maintains that a valid marriage is indissoluble. In 1866, the American hierarchy of that Church declared that "No state law can authorize divorce, so as to permit the parties divorced to contract new engagements." In 1885, Leo XIII in his Encyclical "On the Christian Constitution of States" condemned modern governments for legislation on marriage at variance with Catholic teaching, more particularly regarding "the indissolubility of matri-

mony." A more recent statement is that of Pope Pius XI ("Encyclical on Christian Marriage," December 31, 1930), in which he denounced as "neo-paganism" the idea that "the lawfulness of divorce must be recognized, and that the antiquated laws should give place to a new and more humane legislation." A good summary of the Catholic position is that of Ryan and Boland in their *Catholic Principles of Politics*.[15] In their view, "the State has no right to make laws affecting the validity of the marriages of baptized persons." Though the Church does not deny the interest of the State in the marriage contract, "She does not admit that human welfare, or social welfare, is promoted by state recognition of any marriage that she pronounces invalid, nor by State prohibition of any marriage that she declares to be valid." The Church does concede the right of the State to set certain requirements regarding residence of the parties, civil licenses, and registration, provided failure to comply with these rules is not regarded as invalidating the marriage. In theory, there is always the possibility of conflict here, as in the marriage of persons below a certain age, which may be valid under church law

[15] New York, 1940, p. 332; English text of Pius XI's Encyclical, published by the National Catholic Welfare Conference (Washington, D. C., 1931).

but forbidden by the State. Mutual adjustments have prevented any serious conflict. In the matter of divorce, for instance, there is nothing to prevent any church from forbidding the divorce and remarriage of its members, even though permissible under state law. It may be said in conclusion that church influence in certain states has helped to keep legislation comparatively conservative in this respect.

Probably no contemporary problems of Church and State relations are more important than those which have arisen in the field of education. In colonial America, religious teaching was generally regarded as an essential part of education. In New England, schools were established by the State, but they were expected to give religious instruction in harmony with the accepted Puritan system. Elsewhere there was no systematic secular provision for schools, which were regarded as mainly a family concern. Much of the work was done by religious agencies, and where public provision was made, as in Virginia, for the education of dependent children, religious teaching was included. Except in a very few Catholic schools, religious instruction was definitely Protestant.[16]

The gradual separation of the Church from the State

[16] For references on the educational phase of Church-state relations, see my *Religion and the State*, p. 161, with the footnotes on pp. 119*ff*.

during the first half-century of the Republic and the great variety of religious groups in our present population have increased the difficulty of providing generally acceptable religious training in public schools. There are now two sharply contrasted views as to the place of religion in any program of general education.

One view, held by many people, both Protestant and Catholic, insists on the prime importance of associating religious with secular education. Any curriculum in which this is not provided for seems to them inadequate. The position of the Catholic Church on this issue was clearly stated by Pope Pius XI in his Encyclical on "The Christian Education of Youth" (December 31, 1929). He insisted that "education belongs preeminently to the Church," since it must prepare not merely for life in this present world but for the more important life to come. Religion should, therefore, be not merely one item in a school program, but its integrating principle.[17]

In opposition to the prevailing American tradition of colonial times and the authoritative teaching of the Catholic Church must be set the general trend of public educational policy for the past hundred years as seen in the constitutions and laws of the states. Even after

[17] English text in *Catholic Educational Review*, March, 1930.

the separation of Church and State, it seemed possible to provide what were considered "non-sectarian" religious exercises in the schools. The mass immigration of the nineteenth century, increasing the number, first of Catholic and later of Jewish people, complicated the problem of "non-sectarian" exercises. What seemed "non-sectarian" to most Protestants has not seemed so to members of other religious groups.

One of the best-known illustrations of this situation was the school controversy which took place in New York in the middle years of the nineteenth century. At that time the "Public School Society," a private organization in New York City, supported partly by private contributions but partly from public funds, maintained schools which provided, beside the usual elementary studies, simple religious exercises. Though the Society regarded these exercises as non-sectarian, Bishop John Hughes, speaking for his fellow-Catholics, insisted that they showed a definitely Protestant tendency, as for instance in the use of the Protestant King James version of the English Bible. He claimed also that the teaching of certain subjects in the school program showed a Protestant bias. The controversy continued for several years and became for a time a political issue in the city

and state. Finally, public support was withdrawn from the Society and a municipal Board of Education was set up with the provision that no school which taught or practiced "any religious or sectarian doctrine" should receive public funds. This result was satisfactory neither to those who favored "non-sectarian" religious training of the kind previously offered, nor to Bishop Hughes and his associates, since it prevented state aid to parochial schools.

During the next half-century, one state after another took action against the granting of public funds to denominational schools. Notable examples of such constitutional provisions are those adopted by New Jersey (1844), Massachusetts (1855), and Colorado (1876). Meantime the general tendency has been to confine the public schools to secular instruction. There has not, however, been any uniform practice regarding such religious exercises as the reading of the Bible and the recital of the Lord's Prayer. Thus in 1910, the Supreme Court of Illinois declared that the reading of the Bible in the King James version had a sectarian character,[18] while the courts of several other states have taken the opposite stand. Even within a given state, variations

[18] 92 Northeastern Reporter 251.

in practice may be based on local public opinion.

The chief factors in secularizing the public schools have been: (1) the belief that religious exercises in the school program were inconsistent with the principle of the separation of the Church from the State; (2) the practical difficulty of working out a formula acceptable to all religious groups; (3) the fact that a considerable number of persons favor in principle a strictly secular type of education.

In marked contrast with the secularizing of the public schools has been the development of other schools under religious auspices. In the so-called parochial schools particularly religious training is regarded as of prime importance. Though schools of this kind are not confined to any one church, those established by the Catholic Church are much the most numerous. The result is that in many parts of the country, especially in the larger centers of population, there are now two parallel systems of education, extending from the elementary school to the college—one supported by the Church and the other by the State. In this steady expansion of the church schools the Catholic hierarchy in the United States is acting in accordance with the policy of the Papacy as laid down by Pius XI. They believe that to

"shut religion out of the school and keep it for home and the Church" is "to train up a generation that will consider religion good for home and the Church, but not for the practical business of real life."[19]

The legal status of parochial schools in relation to the public educational system has been defined by the United States Supreme Court. In the so-called Oregon case, a law of that state providing for the compulsory attendance in public schools of children between the ages of eight and sixteen, or until they had completed the eighth grade, was declared unconstitutional. In support of the Oregon law, it was argued that the association in the schools of children from various religious groups would serve to counteract divisive influences in the community. The court held that the state had no power "to standardize its children by forcing them to accept instruction from public teachers only." It is worth noting that the counsel opposing the claims of the state represented Protestant and Jewish, as well as Catholic, institutions.[20]

While the Oregon decision makes clear the right of parents to send their children to private rather than public schools, there remains the practical difficulty that

[19] *Concilii Plenarii Baltimorensis,* III, lxxxiv *ff.*

[20] 268 U. S. 510.

those who maintain the former feel that they have to carry a double financial burden, since they are also taxed to support the public schools. As the number of children enrolled in parochial schools increases, this financial aspect of the problem has been widely discussed from the church point of view and is likely to become more prominent in the future.

Meantime, attempts have been made to adjust by some kind of compromise conflicting views of the place of religion in the education of youth—to reconcile the claims of the Church with the interest of the State in the civic training of its children. One such plan, known as the "Faribault-Stillwater Agreement," was proposed by Archbishop Ireland of St. Paul and tried for a time in certain Minnesota school districts. Under this arrangement, instruction in the usual elementary subjects was given in church buildings leased to the local school authorities, by members of a Catholic order, who were, however, certified under the state school law. Religious instruction was given by them only outside of school hours. This plan failed to receive general support from either Protestants or Catholics and was abandoned. In two other states, the wearing of ecclesiastical garb by teachers in public schools has been specifically forbid-

den. A somewhat different concession to the advocates of religious instruction has taken the form of releasing school time for such teaching, in the case of pupils whose parents desire it, to be given by the churches to which they belong. This adjustment has been made in several states, and in 1940 it was definitely authorized by the New York legislature, in spite of vigorous opposition on the ground that "cherished American traditions" required "a complete separation of religious education from public education." Members of Catholic, Protestant, and Jewish churches have cooperated in promoting this plan. At the close of the school year 1942-43, it was reported that over 100,000 pupils in New York City were enrolled in such "released time" classes.[21]

In opposition to the general trend of state legislation hitherto, some churchmen have advocated direct grants from public funds in aid of denominational schools. Such action does not seem likely in the near future. It must be remembered, however, that church schools are substantially aided by the general exemption of educational institutions from taxation. They have also been aided to a certain extent by recent legislation. In New York, for example, a constitutional amend-

[21] Federal Council of Churches, *Bulletin*, November, 1943.

ment has lately been adopted permitting school districts to give free transportation to pupils attending private as well as public schools. By a five-to-four vote the Supreme Court has held that a New Jersey statute authorizing school district boards to provide for the transportation of pupils to and from schools, *including parochial schools,* does not violate the "establishment of religion" clause of the First Amendment.[22] Another form of state aid to parochial schools enables their pupils to take advantage of free textbooks furnished by the state to public school pupils. This arrangement, adopted by the state of Louisiana, was attacked as a state contribution to sectarian institutions. The objection was overruled by the United States Supreme Court on the ground that the real beneficiaries were not the schools but the children.[23]

The principle laid down in the Louisiana decision has been endorsed by the President's "Advisory Commission on Education" (1938), which recommended that

[22] Everson *v.* Board of Education of Ewing Township, 67 S. Ct. 504 (1947). For dissenting opinions written by Mr. Justice Jackson and by Mr. Justice Rutledge, see *ibid.,* pp. 513-535. For protests against this trend by Protestant religious bodies as well as by educational organizations, see resolutions in *Churchman,* May 15, 1947. The Catholic position may be found in the *Bulletin* of the Catholic Diocese of New York.

[23] 281 U. S. 370.

various forms of government aid to public schools, including not only transportation and textbooks but also scholarships and health service, be made available to pupils in private schools. This proposal has been sharply criticized but has also been vigorously defended. It is pointed out that since many children will not attend the public schools, it is a matter of general civic interest that such children receive the best education possible in the schools they do attend. It is also argued that "the maintenance of schools under non-public auspices results in a significant reduction in public expense."

In some quarters complaints are heard that public school teaching in subjects not specifically religious shows a definite bias against traditional religion and ethics. Since religion cannot be ignored as a factor in history, it may happen that the treatment, for example, of the Protestant Revolution reflects the Protestant or Catholic sympathies of the teacher. No doubt the teaching of such subjects has sometimes been partisan and unfair, though progress has been made in recent years toward just presentation of opposing views.

In recent years, the most conspicuous criticism of the schools on the ground of alleged anti-religious tendency has centered about the biological sciences and more par-

ticularly the theory of evolution, with its supposed implications for religion and ethics. It has been urged that, as the public school teacher should not engage in propaganda for any particular faith, he should equally refrain from propaganda against the religious and ethical convictions of the community which he serves. Plausible as this argument may seem, it has certainly often been so used by pressure groups as to threaten the freedom of scientific teaching. A conspicuous example of the successful application of such pressure was the Tennessee statute of 1925 which forbade public school instructors "to teach any theory that denies the story of the Divine Creation of Man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." A young teacher of Dayton in that state was tried and convicted on the charge of having given instruction in defiance of this law, though the conviction was finally set aside on technical grounds. Similar statutes were passed in neighboring states. Even without legislation, school authorities elsewhere have attempted with more or less success to prevent free discussion of such topics.[24]

In conclusion, something should be said about religious

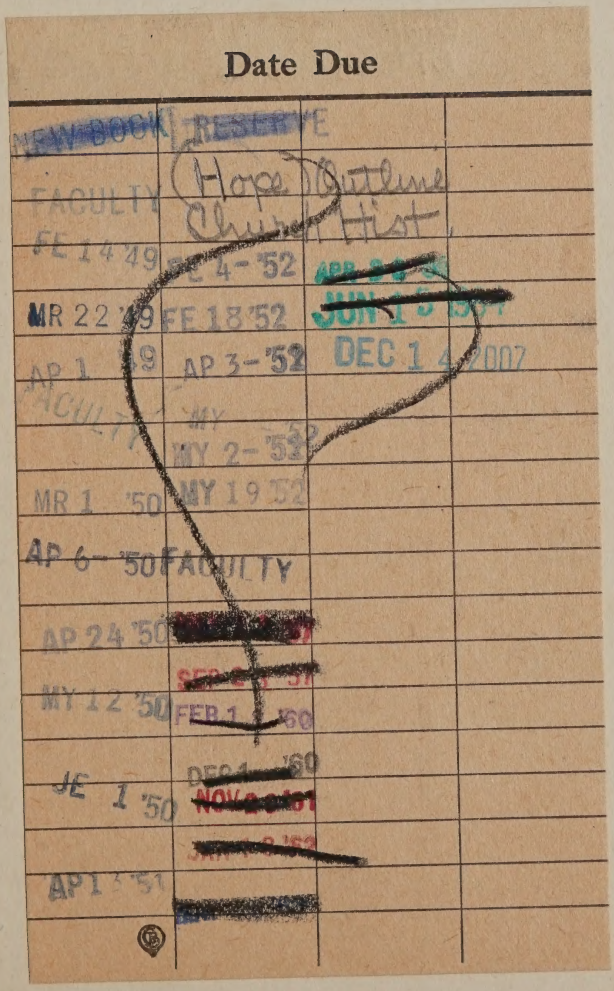
[24] Compare H. K. Beale, *Are American Teachers Free?* (New York, 1936), Chapters IX, X.

factors in national and international politics. From the earliest years of the Republic to the present time, political partisans have exploited religious differences for their own purposes. Conspicuous examples are the Federalist denunciation of the Jeffersonian Republicans as tainted with "French infidelity"; the nativistic movements of the middle nineteenth century culminating in the "American" party of the 1850's, which attacked the Catholic Church as an alien institution and the Pope as a "foreign potentate"; the "American Protective Association" of the 1890's and the more recent Ku Klux Klan, both of which were anti-Catholic as well as anti-foreign. The appeal to such feeling was a recognized feature of the presidential campaign of 1928. Less offensive, perhaps, but still regrettable is the custom in certain areas of distributing candidates among particular religious groups.

In international politics also, religious antagonisms and loyalties have been a complicating factor, as for instance in our relations with Mexico, Spain, and Russia. President Roosevelt thought it desirable in the course of the Second World War to renew diplomatic relations of a special sort with the Vatican by sending Mr. Myron Taylor, himself a Protestant, as a special agent for the purpose of collecting information. Though defended as

a temporary measure of immediate practical value in securing intelligence data, the move evoked protests from many of the more forthright Protestants, especially from the Methodists and Baptists.

In a survey of the Church and State in the United States, three facts clearly stand out. The first is that the American governments, without associating themselves with any particular religious faith, have taken a sympathetic attitude toward religion. It is evident, secondly, that in spite of the supposed complete separation of Church and State, there are certain fields in which they have overlapping and to some extent conflicting claims on the loyalty of individuals. It is equally clear that serious conflicts have generally been avoided hitherto by a willingness on the part of both to accept practical adjustments, without always pushing theories to their extreme logical conclusions. It is in this spirit, with a sincere desire for mutual understanding and a proper respect for honest differences of opinion, that we must face these and other similar problems of the years to come.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